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IN THE

Supreme Court of the United States

OCTOBER TERM 1952

No. 253.

UNITED STATES OF AMERICA, *Petitioner*,

v.

CERTAIN PARCELS OF LAND IN THE COUNTY OF FAIRFAX, Commonwealth of Virginia, and Belle Haven Realty Corporation, et al.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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PETITION OF RESPONDENTS FOR REHEARING

Respondents respectfully petition for a rehearing on the ground that the decision (rendered on April 6, 1953) is rested upon the setting aside of a finding of fact of the District Court, with nothing whatsoever in the record to support such an action. Respondents submit that on the basis of that finding the decision below should be affirmed on rehearing. In any event, they earnestly submit that the most this court can properly do, if it questions the basis of the finding in question, is to remand the case for a trial on the point.

The finding of fact in question is that the consent of respondent Belle Haven Realty Corporation to the taking of the sewer system was given on the express condition that no service charges be imposed on the Belle Haven property owners for the use of their own system. The Court of Appeals stated:

> "If, however, we look to the Realty Corporation alone, the consent necessary to acquisition by the Government is not shown, since its consent was given upon a condition which the Government is unwilling to accept. The Government contends that this appears merely from the answer of the corporation and has not been established by evidence. The judge found it as a fact, however, after hearing the parties in a number of pre-trial conferences." (R. 49).

This court in effect sets aside this finding of fact on the basis of a misapprehension as to the record. This court apparently understood that there was nothing before the District Court as to the nature of the corporation's consent except its answer, which could be construed as a matter of law. As indicated by the above excerpt from the opinion below, this is not correct.

The District Court conducted three hearings on this case. The first was on the motion of the Belle Haven property owners to intervene (R. 10). The second was on their motion for an injunction against the unauthorized service charges (R. 22). The third was a lengthy pre-trial conference which was attended not only by counsel but by official representatives of Fairfax County. Counsel included the attorney for the Realty Corporation, who had personally conducted the negotiations preceding the condemnation. As a result of the statements made during these proceedings, particularly the last, the District Court found (R. 37, 40) that the condition in question qualified the corporation's consent to the taking itself. There is no record to support a departure from that finding. Yet this court has in effect set it aside on the basis of a literal read-

ing of the wording of the corporation's answer and in the absence of a transcript of the pre-trial proceedings.

The Court's opinion construes the condition as directed only to the amount of compensation which could be claimed by the corporation. Even if it were so construed, it seems inconceivable that this court would permit the government to justify this taking on the basis of an agreement which it has admittedly failed to honor. It must be that counsel have failed to present this point clearly. That is why we presume to ask this further consideration by the court.

2. We submit that the most this court can properly do, if it questions the basis of the "finding" by the District Court in this respect, is to include this question within its remand, and require a trial on the facts. It is a part of the government's burden of proof in this case to prove the "consent of the owners." Such consent was a condition precedent to a taking under the statute. The government did not even plead such a consent. Assuming that it may now be allowed, in effect, to amend in order so to plead (see opinion of this court, page 6), still it remains for the government to *prove* the consent. Certainly it cannot do so by now pointing to a pleading which it says requires a conclusion different from that which the District Court reached after actually hearing the parties.

This court has remanded the case for a trial on other issues. It would be most unjust to foreclose this question, in the reverse of the conclusions below, particularly when there now must be a trial on the facts anyway.

CONCLUSION

Respondents submit that there is no basis in the record or in fact for overturning the finding of the District Court as to the conditional consent of the Belle Haven Realty Corporation; and that accordingly the court should grant a rehearing and affirm the decision below on that ground.

In any event, if the court questions the basis for that finding, the government must prove at a trial that there was an unconditional consent, and the court's opinion should be amended so as to include this question within the scope of the remand.

Respectfully submitted,

FREDERICK A. BALLARD,
JOSEPH W. WYATT,
Attorneys for Respondents.

CERTIFICATE OF COUNSEL.

I, Frederick A. Ballard, counsel for the respondents, do hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay.

FREDERICK A. BALLARD.

April 21, 1953.